

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
FIRST APPEAL NO. 316 OF 1993**

Walaitilal Kohli (deceased)

through heirs and legal

representatives

1A. Smt. Kaushalya R. Kohli & Ors ..Appellants

versus

V. Mathew

..Respondent

Mr. R. M. Agrawal with G. Agrawal for the
Appellants.

Mr. A. Y. Sakhare i/b. Smt. D. Nag for the
Respondent.

CORAM : D. G. DESHPANDE, J.

DATE : 10TH FEBRUARY, 2005

ORAL ORDER :

1. Heard counsel for the Appellants and the
Respondent.

2. Appellant No.1 was the original plaintiff.
He filed Civil Suit against the respondent for
possession on the ground that the respondent -
defendant was a rank trespasser in respect of the

two cabins bearing Nos. 5 and 6. About number of cabins in dispute and involved in the suit there is no dispute. The suit came to be dismissed, therefore this Appeal.

3. The case of the defendant is that he was inducted by Mirchandani who was the Estate Manager or friend of the plaintiff and he paid rent and deposit to Mirchandani, that he was not trespasser, that he has been asserting his status as a tenant occupant in respect of both the cabins right from the beginning he has paid rent to Mirchandani and also to the Plaintiff for which the plaintiff did not pass receipts. He relied upon certain receipts issued by Mirchandani and also certain letters and correspondence, returns to the Income Tax Department asserting his claim in respect of both the cabins as a tenant.

4. The case of the defendant was accepted by the trial court and all those findings of the trial court, have been challenged.

5. The question in this case is very short and simple, viz. whether the defendant succeeds in proving that he is legal occupant of the cabins or he was a tenant, and answer to that question has to be in the negative. Firstly, because there is

nothing with the defendant to show that the plaintiff had ever authorised Mirchandani to induct anybody in his property. Not a single admission of the plaintiff in any form whatsoever could be produced by the defendant in that regard. It is not the case of the defendant that Mirchandani was constituted attorney of the plaintiff with rights to let out the premises, to receive rent and to receive deposit. Most surprisingly the defendant even though claiming all his rights through Mirchandani did not care to examine Mirchandani. The finding of the court that it was the obligation of the plaintiff to examine Mirchandani, was totally unwarranted because it was the case of the plaintiff that the defendant is a rank trespasser. Plaintiff never admitted that he has authorised Mirchandani to deal with his property in the manner alleged by the defendant. The entire case of the defendant rests upon certain documents purportedly or allegedly executed by Mirchandani. They are receipts at Exhibits 2A, 3, 4 and 5. All those receipts are issued by Mirchandani. Defendant can succeed only if he is in a position to prove that Mirchandani was authorised to collect rent or accept the deposit. There is nothing with the defendant in that regard. Receipts are of no use whatsoever, they cannot help the defendant in establishing his contractual relationship. Their evidentiary value is nil, they

did not take the case of the defendant any further.

6. Counsel for the respondent - defendant

strenuously urged that when plaintiff gave notice Exhibit 8 raising objection about some construction being carried out by the defendant, the defendant gave reply vide Exhibit Y-3 dated 4.9.1974 and in that the defendant has asserted that he has paid rent to the plaintiff but the plaintiff has not issued any receipts. Counsel for the respondent - defendant contended that this reply still show that the defendant has been asserting his status as a tenant and also asserting payment of rent. This assertion by the defendant in his reply is of no help in establishing the relationship. This is an admission by the defendant as defined in the Evidence Act and admissions in favour of the maker i.e. defendant are not admissible at all. Therefore, it will be clear that when on one hand the plaintiff has been denying the status of the defendant as a tenant to any of the cabins when in the list of tenants given by the plaintiff to the Income Tax Department the name of the defendant does not figuring that the plaintiff informed the Income Tax Department specifically and in clear terms that the defendant is not in tenant in respect of any of the cabins, then the mere assertion in this letter

Exhibit 8 without there being any evidence of contractual relationship when Mirchandani is not examined by the defendant, when there is no admission by the plaintiff at any period of time about the defendant being tenant, the court was not at all justified in dismissing the suit. The finding of the trial court in respect of one room in favour of the defendant and denying the claim of the plaintiff in respect of other room on the ground of delay or conduct, is also not justified.

7. Counsel for the defendant tried to contend that if at all the defendant had trespassed in the two cabins, the conduct of the plaintiff shows that the plaintiff has either accepted the defendant as his tenant or has acquiesced any tenancy rights. When specifically questioned to the counsel for the defendant whether this so-called inaction on the part of the plaintiff can be construed as an admission of the status of the defendant as a tenant, which is actually a contract between the parties as contemplated under the Transfer of Property Act, he could not positively assert that such an inference should be drawn. Therefore mere inaction by the plaintiff or delay in filing of suit for reasons best known to the plaintiff cannot cloth the defendant with the status of the tenant. The entire judgment of the trial court is perverse, It

has not gone to the crucial aspect of the matter and placed burden of proof upon the plaintiff, therefore that judgment cannot sustain. In the result, the appeal is to be allowed. Hence, order:

ORDER

Appeal is allowed.

Suit of the plaintiff is decreed with costs throughout.

There will be an enquiry into the mesne profits under Order XX Rule 12 of CPC.

Prayer for stay is rejected because the defendant's case is found to be totally false

10.2.2005

(D. G. DESHPANDE, J.)